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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE SPANISH SMACK PAQUETE HABANA, Juan Pasos, claimant, appellant, *v.* THE UNITED STATES. } No. 395.

THE SPANISH SCHOONER LOLA, TOMAS Betancourt, claimant, appellant, *v.* THE UNITED STATES. } No. 396.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MOTION TO MODIFY DECEEE.

The Solicitor-General, on behalf of the United States, respectfully moves the court to modify the decree in these causes by vacating the allowance of damages, or so restricting such allowance as to make the damages merely compensatory.

Under the circumstances, in view of the finding of the court as to the law, it may be that compensation in the nature of interest should be granted, so that the claimants may be restored to the position they occupied before the capture—in other words, that they shall be made whole; but, taking the decree as it stands, it will be urged when the mandate goes down that the damages allowed by the court, in addition to costs, implies that the capture was not only without probable cause in the usual sense, but was wholly groundless and even grossly unjustifiable, and that in assessing damages, not only compensation, but punishment, should be kept in mind. It will be urged that the rule now announced by this court has in effect heretofore been clear and definite; that ignorance of this rule can not excuse, and that the capture, therefore, was, in the view of the law, a malicious tort. Counsel for the claimants will insist that the unrestricted award of damages in a prize case is not merely compensatory, but punitive in character; that it is a rebuke for a marine trespass, whether intentional or unintentional; and if unintentional, that ignorance of the law which forbade it is no excuse.

In war a high degree of vigilance and a strict discharge of duty are expected from every naval officer. Fishing vessels of the enemy have often been used as dangerous auxiliaries by acting as spies or conveying information. In the exigencies of war, heretofore at least, a naval commander could not institute an inquiry regarding the objects of fishing vessels and safely adjudge the innocent intent of those on board the craft and accordingly release them, unless he had been expresly authorized to do so.

It is submitted that since there was no express exemption in this war, and since the authorities show that up to the present time grave doubt has existed as to the existence and recognition of the rule now authoritatively expounded by the court, the captors can not fairly be charged with damages consequent upon the breach of a law of which they were ignorant.

The precedent of our own executive action in the Mexican war was not a known and published order, but was hidden away in an original manuscript volume of correspondence and instructions which had escaped the definite knowledge of the text writers, as well as the attention of the executive department most nearly concerned, and was brought to light with some difficulty. By its terms it allowed Mexican boats engaged *exclusively* in fishing on any part of the coast to pursue their labors unmolested. The records in the cases at bar show that fishing was not the exclusive occupation of these boats. In the Crimean war the authorities seem to show that the allied English and French forces seized Russian fishing boats.

In the case of the *Crescent City Live Stock Co.* v. *Butchers' Union* (120 U. S., 141; see especially p. 149 and the first paragraph of p. 158) it was held that although a decree of a lower court may be reversed on appeal, such decree so far retains its force that it is a bar to a suit for malicious prosecution. The analogy of that authority suggests stronger reasons for a similar claim on behalf of the captors in the cases before the court. No malice can possibly be attributed to them. Hence the decree of the court below, which was approved by the

dissenting opinion of this court, in itself justifies the contention that probable cause for the seizure existed.

In *The Marianna Flora* (11 Wheat., 1), it was held that the commander of a cruiser, having fairly exercised his discretion in judging whether an attack upon him by a foreign vessel was piratical, can not be held responsible in damages for not having come to the conclusion which upon a subsequent judicial investigation appears to be correct.

Probable cause exists where there are circumstances sufficient to warrant a reasonable ground of suspicion, even though not sufficient to warrant condemnation. "And such is the view held by all writers on maritime warfare and prize. To adopt a harsher rule and hold that the captors must decide for themselves the merits of each case would involve perils which few would be willing to encounter." (*The Thompson*, 3 Wall., 155, 163, and auth. cit.)

As to the measure of compensation, the case of *The Apollon* (9 Wheat., 362), although not similar to those at bar, states the general rule by Story, J., as follows (pp. 96, 97):

> This court on various occasions has expressed its decided opinion that the probable profits of a voyage, either upon the ship or cargo, can not furnish any just basis for the computation of damages in cases of marine tort. * * * Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted as a fair recompense, and the addition of 10 per cent has been sometimes made where the property

> was sold under disadvantageous circumstances or had not arrived at the country of its destination. Such, it is believed, has been the rule most generally adopted in practice in cases which do not call for aggravated or vindictive damages.

From that case it seems that sale of cargo under a perishable monition is not always disadvantageous, because it may obtain a higher price than the appraisement.

See also the case of *Maley* v. *Shattuck* (3 Cr., 458), where it appears that a naval commander properly stopped and searched a neutral vessel, but, in the exercise of his judgment on the propriety of detaining her, the circumstances of suspicion in the case were not sufficiently strong to justify the seizure which was made.

The case of *The Amiable Nancy* (3 Wheat., 546) considers costs and damages upon facts which disclose a gross and wanton outrage by the boat's crew of a privateer without just provocation or excuse.

It is submitted, in view of these authorities respecting *neutral vessels*—in which the decrees below were against the captors, either absolutely or substantially—that even where probable cause was wanting, the measure of damages was compensatory only and not vindictive, unless the case presented a wanton outrage. Here I have sought to show, on the authority of other adjudications of the court, that there was probable cause; *a fortiori*, therefore, the claimants should be held by the terms of the court's decree to a moderate compensation for the loss.

It is respectfully submitted in conclusion that the motion may properly prevail, so that the claimants shall

receive the proceeds of the vessels and cargoes, with such additional compensation by way of interest on the value thereof as may seem meet, but not damages as for a wholly unjustifiable seizure.

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